ROSITA BAHAROM & ANOR.

v.

SABEDIN SALLEH

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[HC CIVIL SUIT NO. 23-41-81]
12 OCTOBER 1991

TORT: *Negligence - Running down - Plea of contributory negligence - Whether open to the plaintiff to rely on the defendant's version of the collision which has been accepted by the Court - Procedure - Whether other party taken by surprise - Pleadings vis a vis evidence in Court - Plea of contributory negligence - Statement of claim amended to allege contributory negligence after conclusion of evidence but prior to submission - Onus of establishing contributory negligence - Ultimate burden on plaintiff.*

CIVIL PROCEDURE: *Whether open to plaintiff to rely on defendant's version of the collision which has been accepted by the Court - Vague pleadings - Request for further and better particulars - Specificity - Amendment to statement of claim after evidence concluded but prior to submissions.*

On 28 April 1979 an accident occurred between the plaintiff infant pedestrian and the defendant owner of a Vespa scooter. The plaintiff alleged that she had been struck from the rear by the defendant while walking along a stretch of road.

The defendant on the other hand alleged that it was the plaintiff who had, without warning, darted across the road from the right to the left, giving him no opportunity to avoid the collision. The plaintiff's witnesses said that the plaintiff was walking along her side of the road.

The pertinent question for the Court was whether it was open to the plaintiff to rely on the defendant's version of the collision which has been found by the Court to be true, in order to establish her claim for damages, despite the Court having refused her version of the collision.

Another question for determination was whether the plaintiff's Counsel was at liberty, during his final submission, after the close of the case of the defence, to rely on the defendant's evidence in order to make out a case of contributory negligence on the part of the defendant.

Held:

[1] The blood stain on the road would most probably indicate the place where the plaintiff landed after the collision and not the point of impact.

[2] No reason had been vouchsafed to this Court as to why the defendant rider should have literally ploughed into the rear of the plaintiff who was allegedly walking in a perfectly normal manner keeping about three feet from her left edge of the road, when there was ample room for him to have passed her in safety. On the other hand, there was cause for the plaintiff to have wanted to cross the road in order to catch a bus to school.

[3] The injuries suffered by the plaintiff, predominantly on the left side of her body, are more consistent with the defendant rider's version than that of the plaintiff's witnesses. The absence of any injuries to the posterior of the plaintiff is wholly inconsistent with the story that she was struck from the rear.

[4] It is obvious that there are material differences in the way the case for the plaintiff was put in her pleadings, and this would go to hinder rather than assist her case.

[5] Although there was some inconsistency between the defendant's testimony and the sketch plan as to the position of the scooter after the collision, this single factor could not outweigh the deficiencies in the plaintiff's case.

[6] On the evidence, at the material time the plaintiff was crossing the road from right to left when she was knocked down by the defendant who was proceeding along his right of way.

[7] A plaintiff in a running down case can depart from his pleadings at the hearing provided the defendant is not taken by surprise.

[8] As the ultimate burden of establishing a case rests with the plaintiff, then if the plaintiff's version of the accident is rejected, then his or her claim should be dismissed.

[9] Vague pleadings may be cured by acceding to a request for further and better particulars; however a balance must be struck between the need to advise a party in advance of the hearing of the allegations which have to be met and the need to avoid any unnecessary legalisms which may flow from too readily permitting a request for further and better particulars. Where pleadings are not formulated with sufficient specificity, the means by which prejudice to a party may be avoided may well be found in providing further particulars or granting any necessary adjournment.

[10] In this case, the amendment to the statement of claim, inserting a claim for contributory negligence, was made after the hearing of the evidence adduced by both parties had been concluded but before submissions were made.

[11] From a procedural point of view, the plaintiff could have relied on the defendant's version of the collision to establish her claim if, as soon as the defence was delivered, her solicitors had applied for leave to amend her statement of claim by adding a para. in the following words or words to the like effect "if negligence on the part of the plaintiff is proved, the defendant was also negligent and, but for this negligence, the collision would not have occurred".

[12] In support, the plaintiff should also have pleaded in her statement of claim particulars of the defendant's negligence or contributory negligence by alleging, for example, that the defendant was travelling at an excessive speed, had failed to keep a proper look out and, as a result or had failed to anticipate the risk of the plaintiff crossing the road, had failed to give warning of his approach, bearing in mind that there were school children in the vicinity who were liable to cross the road.

[13] Had the plaintiff promptly pleaded in the alternative as aforesaid, and had her Counsel put it to the defendant in cross-examination, as he undoubtedly should have, that even on his own version he was guilty of contributory negligence and why, instead of merely putting it to him that his version was false whilst that of the plaintiff's was true, then most probably the re-examination of the defendant and generally the case of the defendant would have been differently developed.

[14] The plaintiff's failure to apply for leave to amend her statement of claim as soon as the defence was delivered, and the failure to plead specifically in her statement of claim the defendant's negligence or contributory negligence, resulted in the defendant being taken by surprise and therefore being prejudiced.

[Plaintiff's action dismissed with costs.]

Cases referred to:
Kayat & Anor. v. Lim Yew Seng [1972] 1 MLJ 26 ***(foll)***
Wong See Leng v. C. Saraswathy Ammal [1954] MLJ 141 ***(foll)***
Tan Lian Chye v. Malayan Railway Administration [1967] 2 MLJ 276 ***(foll)***
Menah binti Sulong v. Lim Soo & Anor [1983] CLJ (Rep) 263 ***(foll)***
K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail [1981] 2 MLJ 10 ***(foll)***
Siti Aisha binti Ibrahim v. Lim Soo & Anor [1982] 2 MLJ 124 ***(foll)***
Playing Cards (Mal) Sdn Bhd v. China Mutual Navigation Co Ltd [1980] 2 MLJ 182 ***(cit)***
Ang Koon Kau & Anor. v. Lau Piang Ngong [1985] CLJ (Rep) 24 ***(foll)***
Williams v. Commissioner for Road Transport [1933] 50 CLR 258 ***(foll)***
Goldstein v. R [1947] NZLR 588 ***(foll)***
Hocking v. Bell [1943] 43 SR (NSW) 154 ***(foll)***
Noor Azahar bin Habin v. Rajaswari a/p Sithampara Pillai & Anor [1991] 3 CLJ (Rep) 339 ***(foll)***
Stevenson v. United Transport Union [1976] 3 All ER 29 ***(cit)***
Seng Chong Metal Works Ltd. v. Lew Fa [1962] MLJ 64 ***(foll)***

Legislation referred to:
Limitation Act 1953, s. 6(1)

Other sources referred to:
Current Legal Problems, pp. 171 *et.seq.* at p. 174, Sir Jack Jacobs
Negligence on the Highway p. 208 by Dr. Mazengarb

For the plaintiff - Baldev Singh Bhar (Rhina Bhar with him); M/s. Rhina Bhar & Associates
For the defendant - Balachandran Mahesan; M/s. Bala Mahesan & Co.

JUDGMENT

Edgar Joseph Jr J:

In this running down case, there are points of principle, pleading and practice of considerable practical importance to practitioners which arise for decision, but so far as the merits are concerned, the Court is faced with the familiar problem of having to choose between two conflicting versions as to how a collision involving the infant plaintiff, a pedestrian (the plaintiff), and the defendant, the rider of a Vespa motor scooter, had occurred.

It would be more convenient if I consider the merits of the case first and then embark upon a consideration of the legal issues.

More particularly, the case for the plaintiff, a 10-year old girl, was that she had been struck from the rear in broad daylight by the defendant rider while she was walking side by side with her elder sister, in a perfectly normal manner, along a straight stretch of road known as the Jalan Sungei Acheh/Tanjong Berembang Road, 16 feet wide, keeping close to her left edge, intending to board a bus at a point on the other side of the road, to go to school.

On the other hand, the case for the defendant rider was that he was proceeding along the road in a perfectly normal manner at a speed of about 30 kph when the plaintiff suddenly, and without warning, darted across the road from the right to the left, giving him no opportunity to avoid the collision.

There was thus an acute conflict of evidence between the version advanced on behalf of the plaintiff and that on behalf of the defendant. A Judge most keenly feels his responsibility when he must determine credibility as between witnesses.

The plaintiff did not herself testify at the hearing perhaps because she had suffered fairly severe head injuries resulting in residual disabilities. However, her sister Roslina (PW2) and a witness Bashir bin Mohammed (PW1) did testify and so did the defendant rider.

I shall now refer to the rival versions of the parties as to how this collision occurred in greater detail.

Bashir, aged 18 years at the material time, testified that at about 7.15 a.m. on 28 April 1979, he had witnessed the collision involving his neighbour the plaintiff, who he knew well and the defendant rider, a total stranger to him. The witness claimed that he was then standing by the roadside, on the left as one faces Tanjong Berembang, waiting to catch a bus while the plaintiff was walking with Roslina, abreast of her, from Sungei Acheh towards Tanjong Berembang. More particularly, he said that the plaintiff was walking about 3 feet from her left edge of the road, on its metalled surface, while Roslina who was on the left of the plaintiff was walking on the side table; they were walking towards him. Both the plaintiff and Roslina were dressed in their school uniforms on their way to school and each carried a bag. He said that it was the practice of the plaintiff to go to school by bus.

He then said that he saw a scooter coming from the direction of Sungei Acheh towards Tanjong Berembang and collide into the plaintiff from the rear as a result of which the plaintiff fell unconscious to the ground on her left while the scooter landed in a drain. He went to the aid of the plaintiff whose mother Siti Johari bin Ahmad (PW7) appeared on the scene some five minutes later. Together they helped the plaintiff into a car which had pulled up at the scene and in this way the plaintiff was taken to the hospital.

Bashir maintained that the plaintiff was not crossing the road nor was she standing in the middle of the road when the collision occurred.

The plaintiff's sister Roslina also asserted, like Bashir, that at the material time she was walking abreast of the plaintiff who was "about 3 feet from the right edge of the road as one faces Sungei Acheh" (or in other words 3 feet from the plaintiff's left edge of the road). They were proceeding in the direction of Tanjong Berembang to catch a bus to go to school at Sungei Acheh. While thus proceeding, the plaintiff was knocked down from the rear by the scooter which came from the direction of Sungei Acheh, as a result of which the plaintiff fell to the ground and the scooter landed in a drain. She corroborated Bashir's evidence that the plaintiff never attempted to cross the road nor was she anywhere near the centre of the road when the collision occurred.

I must next refer to the testimony of the plaintiff's mother Siti Johari, but only briefly, as she never saw the collision. She merely said that on the day in question she had accompanied her two daughters for a short distance along the road leading to Tanjong Berembang and then was walking home when she heard the sound of a collision which caused her to turn back and to hasten to where the plaintiff lay.

I now turn to consider the testimony of the defendant rider. He testified that at the material time he was riding his scooter at about 30 kph along the stretch of road in question coming from the direction of Sungei Acheh and proceeding towards Tanjong Berembang when he first noticed, "about four electric poles away", to his right, three girls standing on the grass verge. As he was approaching a bend, he slowed down. When he was about 6 feet from the girls, one of them - without doubt the plaintiff - suddenly flapped her hands and dashed across the road straight in front of the scooter in circumstances in which she could not possibly have crossed in front of it without being knocked down. He tried to swerve, though he had no time to brake, but simply could not avoid colliding into her. Both the plaintiff and he fell to the ground; the plaintiff lying on the left side of the road with her head nearest to the central white line while he himself lay near her, his scooter landing in the drain to his right.

Under cross-examination, by Counsel for the plaintiff, the defendant said that before the collision he had slowed down to a speed of about 25 to 30 kph. He was then more or less 20 feet from the children. In answer to the Court, the defendant first said that the plaintiff had traversed about 7 feet of the road when the collision occurred, then he said that the plaintiff had traversed about 4 feet of the road. Earlier, in answer to the Court, he had said that he was 3 to 4 feet from the plaintiff when he first saw her crossing the road. Asked to indicate this distance he indicated a distance which both Counsel agreed to be about 6 feet. Under further cross-examination he confirmed that he was very positive that the plaintiff had crossed the road from his right to the left. He also said that when he saw the plaintiff crossing the road he swerved to the left to avoid her. Counsel for the plaintiff then remarked though in interrogatory form, "then your scooter should have landed on the left hand side of your road not your right?" To which the defendant replied, "Behaviour of motor scooter would be different from motor cycles."

On the same day, about 45 minutes after the collision, the defendant made a police report (pp. 5 and 6 of the agreed bundle) which though concise was clear and precise and was wholly consistent with his testimony in Court.

The defendant was cross-examined at length by Counsel for the plaintiff but emerged unscathed.

The sketch plan and key (pp. 8 and 9, agreed bundle) indicated that the road at the scene was 16 feet wide with an intermittent longitudinal central white line and that there was a slight left hand bend as one proceeded in the direction of Tanjong Berembang. There was also a blood stain at the point F, which was 8 feet from the left edge of the road as one faces Tanjong Berembang. The scooter is shown as having landed in a drain on the right side of the road as one faces Tanjong Berembang.

I must now evaluate the testimony of Bashir and Roslina on the one hand, and that of the defendant rider on the other.

I would first of all say that the blood stain on the road would most probably indicate the place where the plaintiff landed after the collision and not the point of impact. (See *Kayat and Anor. v. Lim Yew Seng* [1972] 1 MLJ 26). No debris such as fragments of glass are indicated in the plan; had there been such evidence it might have afforded cogent proof of the point of impact.

Secondly, I must now test the rival versions of the collision. No reason had been vouchsafed to this Court as to why the defendant rider should have literally ploughed into the rear of the plaintiff who was allegedly walking in a perfectly normal manner keeping about three feet from her left edge of the road, when there was ample room for him to have passed her in safety. On the other hand there was cause for the plaintiff to have wanted to cross the road in order to catch a bus to school.

Thirdly, I would refer to the admission report on the plaintiff recorded by the doctor at the District Hospital, Taiping, at about 9 a.m. on the day of the collision. It shows that out of six itemised injuries, four were sustained by the plaintiff on the left side of her body, the most serious physical injury being a non comminuted fracture of the left tibia and fibula. But, significantly, no injuries are indicated on the posterior of the plaintiff. Specifically, the injuries found were these:

(1) 2½" lacerated wound (L) occipital region (stitched).

(2) 1" x 3¼" abrasion (R) chest.

(3) 1" x ½" abrasion extending laterally from left upper lip;

(4) ¼" abrasion (L) chin.

(5) Bruises over (L) elbow (R) knee (L) knee.

(6) Swelling with tenderness over

(L) leg upper 1/3. X-ray showed:

(L) tibia and fibula - fracture
at the junction of upper and
middle 1/3
Non comminuted simple fracture.
MVA with fracture (R) tibia and fibula.

It seems to me that for reasons which are self-evident, these injuries are more consistent with the defendant rider's version than that of Bashir or Roslina. I would emphasise that the absence of any injuries to the posterior of the plaintiff as being wholly inconsistent with the story that she was struck from the rear.

Fourthly, it would be pertinent to consider the pleadings in the case; in particular, the statement of claim, to see what it alleged against the defendant rider. By her original statement of claim dated 31 May 1979, the case for the plaintiff was that at the material time "she was standing along the middle white line". But by her amended statement of claim (amended pursuant to order of Court dated 6 February 1987), the case for the plaintiff was that she was "walking along the right edge of the road ... as one faces Sungei Acheh". However, by her further amended statement of claim dated 24 January 1991 and re-dated 5 February 1991, the case for the plaintiff was that she was standing along the right edge of the road between Sungei Acheh and Sungei Berembang as one faces Sungei Acheh allowing traffic to pass before proceeding to cross the road ... " In each case, it was alleged, not expressly, but by implication, that the defendant had collided into the plaintiff from the rear.

It is obvious that there are material differences in the way the case for the plaintiff was put in her pleadings, and, in my view, this would go to hinder rather than assist her case.

I have already listed three criticisms regarding the plaintiff's case. On the other hand, I have no criticisms to make regarding the defendant's version.

However, lest I be accused of an oversight, I would, at this stage, interpolate to say that there was an apparent inconsistency between the testimony of the defendant rider that he had swerved to his left in order to avoid colliding into the plaintiff who had crossed the road from his right to the left, as compared to the sketch plan, which showed that his scooter had landed in a drain to his right. I have already noted that when cross-examined by Counsel for the plaintiff on this point the defendant rider did not offer any precise explanation but just said generally that "Behaviour of motor scooter would be different from motor cycles". In his submission, Counsel for the defendant made the point that a Vespa motor scooter has its engine in its right compartment and this could have accounted for the apparent inconsistency. This may or may not be so. I did not have the advantage of the evidence of an expert on aerodynamics to elucidate the point and all I need say is that it is difficult to predict the vagaries of a Vespa motor scooter involved in a collision such as this.

I would however observe that in an emergency situation such as that which confronted the defendant, with the plaintiff crossing the road from his right to his left, it might have been natural for the defendant to have attempted to avoid the collision by swerving to his right,

that is to say, by going behind the plaintiff and this could explain why the scooter landed in the drain to his right. The defendant driver, however, said that he swerved to his left. But this might have been due to an inability to recall having regard to the very considerable time lag between the collision and the trial.

In any event, I do not consider that this single factor, as to the position of the scooter after the collision, could outweigh the three criticisms of the plaintiffs' case outlined above.

In all the circumstances, I regret I am unable to find that the plaintiff was struck from the rear as she walked along the road in the direction of Tanjong Berembang keeping close to her left edge. I therefore reject the version of the collision given by her sister Roslina and her neighbour Bashir. On the contrary, I find that the defendant's version of the circumstances of the collision is substantially correct. In other words, I believe the defendant and find as a fact that at the material time the plaintiff was crossing the road from right to left when she was knocked down by the defendant who was proceeding along his right of way.

Those being the facts found, I must now address the question of law relevant to the issue of liability; specifically, the question is: Is it open to the plaintiff to rely on the defendant's version of the collision which has been found by the Court to be true, in order to establish her claim for damages, despite the Court having rejected her version of the collision?

In *Wong See Leng v. C. Saraswathy Ammal* [1954] MLJ 141 a decision of the Federation Court of Appeal, Murray-Aynsley CJ (Singapore) said this:

> The first question was one of procedure. The pleading of the plaintiff alleged certain facts, the defendant's other facts. The plaintiff considered that the facts alleged by the defendant entitled her to a judgment. When the case came on for hearing Counsel elected to adopt the facts alleged in the defence and ask for the judgment that would have been appropriate if those facts had been alleged by her in her statement of claim and proved at the trial. I think that this can be done if it is done in the proper way. I think that the step should be taken as soon as possible after the defence has been delivered and there should be proper notice to the other side. **There should be no question of surprise,** and if the matter can be decided in this way a great deal of time and expense can be saved, in particular it is not necessary to have witnesses in attendance.
> (Emphasis added)

In *Tan Lian Chye v. Malayan Railway Administration* [1967] 2 MLJ 276, the plaintiff an 8 year old boy was run over on a railway line in Singapore by a train under the control of the driver and guard employed by the defendants. At the hearing the version of the accident given by the plaintiff and that given by the defendant were materially different but Counsel for the plaintiff submitted that the plaintiff could rely on the facts proved by the defendant (and accepted by the Court) to establish his claim in negligence even if his own version of the facts had been rejected. On the other hand, Counsel for the defendant submitted that if the plaintiff's story were rejected, his claim should be dismissed. The Court (Winslow J) after reviewing certain authorities said this at p. 279 Col 1 B:

> It would seem from these authorities that a plaintiff may rely on the pleadings of the defendant and the finding of the Court thereon if this will help to supplement deficiencies in his own pleadings and the evidence called on his behalf in respect of the relief he has claimed, **provided he does not take the defendant by surprise.** I do not, however, think that these authorities can possibly be said to go so far as to license perjury on his part, or what may be well-nigh perjury, and then to enable him to rely on the defendant's version as against his own to support his claim. I am therefore inclined to agree with Mr. Mooney that a plaintiff's claim founded on evidence adduced by him which is wholly rejected should be dismissed.
> (Emphasis added)

In *Menah binti Sulong v. Lim Soo & Anor*. [1983] CLJ (Rep) 263, the plaintiff was a passenger on a back carrier of an adult bicycle ridden by her nephew, a boy of about 10. In her statement of claim and repeatedly in her evidence she had stated that she had alighted from the bicycle and was standing on the grass verge when the car knocked her down, being on its wrong side of the road when it did so. This allegation was denied by the defendant who said that the bicycle shot out of a side road without stopping at the junction and that the cause of the collision was due solely to the negligence of the plaintiff. The learned trial Judge adopted the version of the collision given by the defendant and dismissed her claim. On appeal, Ong CJ who spoke for the Federal Court, in dismissing the appeal, said:

> It is not open to this Court to try and make out a case for her which she never adumbrated in her own pleadings, she herself having left no option for the trial Judge, or this Court, to treat the issue of contributory negligence as open.

In *K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail* [1981] 2 MLJ 10, an action for the recovery of money allegedly due under a deed of compromise, the only defence pleaded was that the claim was statute barred under s. 6(1) of the Limitation Ordinance 1953. At the hearing, the plaintiff adduced evidence of an acknowledgment which if true would have defeated the defence of limitation. However, the defendant had not pleaded the acknowledgment. The High Court upheld the plea of limitation and dismissed the claim. On appeal, it was held, allowing the appeal (per Raja Azlan Shah CJ, as he then was and now the Yang Di Pertuan Agong speaking for the Federal Court):

> Since the material facts and circumstances were not pleaded in the statement of claim, it should have been pleaded in the reply. Be that as it may, this aspect of the case has been satisfactorily presented and developed in the proceedings before the High Court and we think there are materials on the record from which a decision to that effect could be arrived at. **As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise.** To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.
> (Emphasis supplied)

In *Siti Aisha binti Ibrahim v. Lim Soo & Anor*. [1982] 2 MLJ 124 the statement of claim alleged that the plaintiff was lawfully walking along the proper side of the road when the defendant motorcyclist violently collided into her. On the other hand, the statement of defence alleged that the collision was caused by the plaintiff crossing the road from left to right without first ascertaining that it was safe to do so. However, at the hearing the plaintiff said that she was walking across the road when the collision occurred.

The learned trial President held that the defendant was negligent but that the plaintiff was guilty of contributory negligence.

On appeal by the defendant, the High Court (Arulanandom J) held, allowing the appeal, that on the evidence the only true verdict the learned President could have given was a dismissal of the plaintiff's claim.

On further appeal by the plaintiff, Counsel for the defendant argued that on the pleadings it was the plaintiff's case that at the time of the collision "she was lawfully walking along the proper side of the road" **whereas** in her evidence she said she was walking across the road. Accordingly, it was contended that the failure of the plaintiff to abide by her pleadings was fatal and the plaintiff's claim must therefore be dismissed.

Abdul Hamid FJ (as he then was) speaking for the Federal Court distinguished the case of *Menah binti Sulong v. Lim Soo & Anor.* (*supra*). In that case, both in her statement of claim and repeatedly in her evidence the plaintiff had stated that she had alighted from her bicycle and was standing on the grass verge when the car knocked her down, being on its wrong side of the road, whilst the defendants alleged that the bicycle came out without stopping at the junction **whereas** in the case under consideration although the plaintiff had pleaded in her statement of claim that she was "lawfully walking along the proper side of the road", in her evidence she said she was walking across the road. Moreover, in her police report she had stated she was crossing the road. The defendant in his defence and in his evidence had also said that the plaintiff was crossing the road from the left to right.

In these circumstances, the learned Judge said at p. 126 col 1D:

> It is clear therefore that the defendant was **not misled, prejudiced, embarrassed or in any way taken by surprise, or led astray by the plaintiff's pleading** because from the very outset it was the contention of and the case for the plaintiff, that the plaintiff was walking across the road and not along the road.
> (Emphasis supplied)

After citing with approval the cases of *K.E.P. Mohamed Ali v. K.E.P. Mohd Ismail* (*supra*) and *Playing Cards (Mal) Sdn. Bhd. v. China Mutual Navigation Co. Ltd.* [1980] 2 MLJ 182, the learned Judge concluded that the learned President was entitled to consider the case having regard to the whole of the evidence and to decide it in a manner as was just between the parties. In the result, the appeal was allowed and the judgment of the learned President restored.

In *Ang Koon Kau v. Lau Piang Ngong* [1985] CLJ (Rep) 24, a running down case, the facts were that a lorry had become disconnected from its trailer and the statement of claim alleged that it was the trailer which collided with the plaintiff's motorcycle, **whereas** in evidence the plaintiff confirmed what he had said in his police report, namely, that he was proceeding about 50 feet behind a lorry when its trailer snapped off and then collided with another lorry coming from the opposite direction. He then stopped his motorcycle and went to the side of the road but the oncoming lorry which had collided with the trailer hit him and oil palm fruits from the lorry fell on him. The trial Judge found for the plaintiff.

The main question in the Court below and on appeal by the defendant driver was whether since the statement of claim alleged that it was the trailer which collided with the plaintiff's motorcycle and since no evidence was adduced in support of this allegation, the plaintiff could succeed on his claim. It was held, dismissing the appeal, that evidence given at the trial can in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is **to prevent the other party from being taken by surprise.**

There is thus a consistent current of judicial opinion for the proposition that a plaintiff in a running down case can depart from his pleadings at the hearing provided the defendant is not taken by surprise.

In the present case, by her further reamended statement of claim the plaintiff alleged she was **standing** on the right edge of the road as one faces Sungei Acheh preparing to cross the road to catch a bus when she was knocked down, presumably from the rear, by the defendant rider. At the hearing however the two witnesses she called said that she was **walking** along her side of the road when she was knocked down by the defendant from the

rear. It is arguable whether, in such circumstances, the plaintiff was at liberty to depart from her pleadings even to that extent but, I shall assume in her favour, that she was at liberty to do so.

At this stage, it is pertinent to refer to certain well established principles which govern a plea of contributory negligence.

Now, it is only when initial negligence on the part of the defendant is shown, that a defendant is required to show that the contributory negligence which he alleges was the proximate cause of the accident. (See *Williams v. Commissioner for Road Transport* [1933] 50 CLR 258, *Goldstein v. R* [1947] NZLR 588). Although the onus of proving contributory negligence is on the defendant, simultaneously the ultimate burden of establishing his case is on the plaintiff. (See *Hocking v. Bell* [1943] 43 SR (NSW) 154 (FC) affirmed by a majority of the Australian High Court [1945] 71 CLR 430, 462).

It is on this basis that I think that the principle enunciated by Winslow J in *Tan Lian Chye's* case (*supra*) that if the plaintiff's version of the accident were rejected, his claim should be dismissed, can be defended.

Dr. Mazengarb, in his book *"Negligence on the Highway"*, a work noted for its accurate and lucid exposition of principle, has explained the different senses in which "negligence" and "contributory negligence" are applied to the conduct of a plaintiff and a defendant thuswise at p. 208:

> The plaintiff's negligence may have been a form of conduct which, for a special reason recognised by the law, prevents him from recovering because he did not himself 'use common and ordinary care to be in the right.' It is only in this sense that a plaintiff's negligence (not a defendant's) is correctly described as 'contributory negligence.' He has been 'negligent as regards himself.' (See *Swan v. North British Australasian Co.* [1863] H & C 175 (per Blackburn J). It matters not that in such a case the rashness of the injured person may also have caused damage to another through obliging that other to act on the emergency caused by the rashness of the plaintiff.
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> When applied to the conduct of a plaintiff, both words 'negligence' and 'contributory' are used in a different sense from, and another connotation than, the words 'negligence' and 'contributed' when they are applied to the conduct of a defendant. When a defendant is negligent, it is because he is careless regarding to the rights of others. His duty was not to infringe their rights. But when a plaintiff is debarred from recovery because of his own negligence, all that is meant is that he has been careless in regard to his own safety, and it is immaterial whether at the same time he has also been careless regarding the safety of others.
>
> The negligent defendant is blamed because he has failed in a duty he owed to the plaintiff. The negligent plaintiff does not recover because, on the plea of the defendant, it is shown that he failed in a duty he owed to himself.

The more difficult question is whether the plaintiff's Counsel was at liberty during his final submission, after the close of the case for the defence, to rely on the defendant's evidence in order to make out a case of contributory negligence on the part of the defendant.

Specifically, it is pertinent to note that the first general indication that the plaintiff's Counsel might advance such an argument was on 6 February 1991 (that is to say long after the parties had closed their respective cases at the hearing) when he amended the reamended statement of claim by adding para. 3A which reads:

> 3A. The said collision was caused solely and/or contributed to by the negligence of the defendant in the management and control of the said motor-cycle no. PK 2533.

No particulars were however given of the particulars of the particulars of the contributory negligence on the part of the defendant assuming his version of the collision were adopted by the Court. The effect of this was, in my opinion, as good as not pleading the point at all. (See for example *Noor Azahar bin Habin v. Rajaswari a/p Sithampara Pillai & Anor*. [1991] 3 CLJ (Rep) 339). Nevertheless, I shall assume in favour of the plaintiff that it has been pleaded though without particularisation.

I would interpolate to observe that vague pleadings may be cured by acceding to a request for further and better particulars. Here a balance must be struck between the need to advise a party **in advance of the hearing** of the allegations which have to be met and the need to avoid any unnecessary legalisms which may flow from too readily permitting a request for further and better particulars (See *Stevenson v. United Transport Union* [1976] 2 AER 29 at 33-34). Where pleadings are not formulated with sufficient specificity, the means by which prejudice to a party may be avoided may well be found in providing further particulars or granting any necessary adjournment.

I wish to emphasise the point, however, that in this case, the amendment was made after the hearing of the evidence adduced by both parties had been concluded but before submissions were made.

Be that as it may, Counsel for the defendant has in his written submission attacked the particulars of negligence given in the statement of claim as being wholly inappropriate to the story deposed to by the plaintiff's witnesses that the plaintiff was struck from the rear while walking. In particular, he drew attention to the fundamental point made in the particulars that the defendant had encroached into the path of the plaintiff and asked how could the defendant have encroached into the path of the plaintiff if the plaintiff had been hit from the rear while walking. He concluded that the defendant must know what case he has to meet. It is implicit in this submission that the defendant must not be taken by surprise else he might well be prejudiced.

The question of critical substance which arises is whether it is open to the plaintiff to raise the plea of contributory negligence at such a late stage in a case where, as here, I have rejected the plaintiff's version of the collision whilst adopting that of the defendant's. In an article entitled "The Present Importance of Pleadings" [1960] *Current Legal Problems*, pp. 171 *et seq*, at p. 174, Sir Jack Jacobs has described the function of pleadings thuswise:

> As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings ..... For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. **Each party thus knows the case he has to meet and cannot be taken by surprise at the trial.** The Court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the Court to enter upon an inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realms of speculation ... Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised, by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. (See *Esso Petroleum Co. Ltd v. Southport Corporation* [1956] AC 218, per Lord Radcliffe, at p. 241). The Court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. (See *Esso Petroleum Co. Ltd v. Southport*

Corporation [1954] 2 QB 182, per Marris LJ at 207). In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called 'Any other business' in the sense that points other than those specified in the pleadings may be raised without notice.

And, explaining why pleadings uphold the right to a fair trial, Sir Jack Jacob and Iain Goldrein in their book *Pleadings, Principles and Practice* at p. 12 have this to say:

> The system of pleadings is thus primarily designed to bring the parties to an issue or issues on which alone the Court can adjudicate between them, but it is also designed to fulfil some of the fundamental principles of natural justice, such as: that each party should have fair and due notice of what case he has to meet; that each party should have a reasonable opportunity of answering the claim or defence of his opponent; and that each party should have a reasonable opportunity of preparing his case on the basis of the issues disclosed in the pleadings. On this basis the fundamental right of each party to a fair trial is well founded.

It is with the above principles in mind that I turn to consider the question whether when the plaintiff's Counsel had sought to rely on the defendant's version of the accident to establish the plaintiff's claim, the defendant in this case was taken by surprise and so was prejudiced.

In the first place, two preliminary points deserve attention regarding this part of the case.

The first point is this - from a procedural point of view, the plaintiff could have relied on the defendant's version of the collision to establish her claim if, as indicated by Murray-Aynsley CJ in *Wong See Leng's* case (*supra*), as soon as the defence was delivered, her solicitors had applied for leave to amend her statement of claim by adding a para. in the following words or words to the like effect:

> if negligence on the part of the plaintiff is proved, the defendant was also negligent and, but for this negligence, the collision would not have occurred.

In support, the plaintiff should also have pleaded in her statement of claim particulars of the defendant's negligence or contributory negligence by alleging, for example, that the defendant was travelling at an excessive speed, had failed to keep a proper look out and, as a result, had failed to anticipate the risk of the plaintiff crossing the road, had failed to give warning of his approach, bearing in mind that there were school children in the vicinity who were liable to cross the road.

The second point concerns what Thomson LP had said in *Seng Chong Metal Works Ltd v. Lew Fa* [1962] MLJ 65 with regard to the necessity for putting to the plaintiff the case for the defendant. In my view, this would apply with equal force to the need to put a plaintiff's case to the defendant. What his Lordship said was this:

> Mr. Cashin put it to us that there was a possibility that he was, as it were, lounging against the machine and his hand slipped in. Of course that is a possibility. Everything is a possibility. But there was the plaintiff's own evidence which was not contradicted that he was operating the machine and the hypothesis advanced by Counsel was not put to him in cross-examination.

Now, had the plaintiff promptly pleaded in the alternative as aforesaid, and had her Counsel put it to the defendant in cross-examination, as he undoubtedly should have, that even on his own version he was guilty of contributory negligence and why, instead of merely putting it to him that his version was false whilst that of the plaintiff's was true, then most probably the re-examination of the defendant and generally the case for the defendant would have been differently developed. It is for these reasons that I consider that the defendant had

been taken by surprise and was therefore prejudiced within the meaning of the authorities to which I have referred.

The result therefore is that although my human sympathies are for the plaintiff I am not at liberty to indulge them, and so, with considerable regret, I have reluctantly arrived at the inevitable conclusion that the action must be and is dismissed with costs.

Also found at [1992] 1 CLJ 180